

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 v.

7 BRANDON LAMAR PRUITT,

8 Defendant.

Case No. 2:16-cr-285-APG-NJK

**ORDER GRANTING IN PART MOTION
TO ADMIT STATEMENTS BY THE
VICTIM**

(ECF No. 82)

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10 The Government moves for permission to admit into evidence at trial statements made by
11 the victim (A.D.) under the “forfeiture by wrongdoing” doctrine. ECF No. 82. Specifically, the
12 Government seeks to admit A.D.’s journal and her phone calls with defendant Brandon Lamar
13 Pruitt. The evidence demonstrates that on several occasions Pruitt encouraged A.D. to avoid
14 contact with, and tracking by, the police, with the intent that A.D. not be available to testify at trial.
15 The efforts were apparently successful, as A.D. has apparently ceased contact with the authorities
16 and concealed her whereabouts. Accordingly, I grant the Government’s motion in part.

17 The parties are familiar with the facts, which are laid out in detail in the briefs. I will not
18 repeat them here except as necessary for context. After he was arrested, Pruitt had several phone
19 calls with A.D. from the detention facility using other detainees’ identification. Pruitt encouraged
20 A.D. to not talk to police, and to tell his attorney that she was “tricked” by the police into telling a
21 false story. He encouraged her to get a new cell phone and throw away her old one to avoid being
22 tracked by the police. He also told A.D. to write him a letter with her new phone number, using a
23 false name and return address. Pruitt acknowledged to A.D. that he was barred by the Magistrate
24 Judge from speaking with her. The Government has not been able to locate A.D. since November
25 2016.

26 The Sixth Amendment’s Confrontation Clause bars “admission of testimonial statements of
27 a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had
28

1 a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).
2 “[A] statement cannot fall within the Confrontation Clause unless its primary purpose was
3 testimonial. Where no such primary purpose exists, the admissibility of a statement is the concern
4 of state and federal rules of evidence, not the Confrontation Clause.” *Ohio v. Clark*, 135 S. Ct.
5 2173, 2180 (2015) (citation and quotation omitted). For purposes of the Confrontation Clause,
6 statements “are testimonial when the circumstances objectively indicate that . . . the primary
7 purpose of the interrogation is to establish or prove past events potentially relevant to later criminal
8 prosecution.” *Davis v. Washington*, 547 U.S. 813, 822 (2006). “Statements made to someone who
9 is not principally charged with uncovering and prosecuting criminal behavior are significantly less
10 likely to be testimonial than statements given to law enforcement officers.” *Clark*, 135 S. Ct. at
11 2182.

12 Here, A.D.’s journal entries and her phone calls with Pruitt were not testimonial. The
13 journal entries presumably record her daily thoughts and activities.¹ Her phone calls with Pruitt—
14 while he was in custody on these charges—were clearly not meant to establish or prove events for
15 later prosecution. To the contrary, some of the calls involved the avoidance of prosecution.
16 Because the journal entries and phone calls were not testimonial, their admission does not violate
17 the Confrontation Clause.

18 But even if the journal and calls are considered testimonial, they would be admissible based
19 on the forfeiture by wrongdoing doctrine. “The forfeiture-by-wrongdoing doctrine is an exception
20 to the Confrontation Clause’s protections. That doctrine permits the introduction of a testimonial
21 statement by an unavailable witness if the preponderance of the evidence shows that the ‘witness
22 is absent by [the defendant’s] own wrongful procurement.’” *Carlson v. Att’y Gen. of Cal.*, 791 F.3d
23 1003, 1009 (9th Cir. 2015). The doctrine applies only if the defendant engaged in “conduct
24 designed to prevent a witness from testifying.” *Giles v. California*, 554 U.S. 353, 365 (2008).

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27 ¹ The Government has not identified which specific portions of the journal and the jail calls it
28 intends to offer at trial. Those portions may be subject to other objections (e.g., relevance,
hearsay, etc.). I will rule on those issues as they come up at trial, when there is more context in
which to evaluate them.

1 A preponderance of the evidence shows that Pruitt intended to prevent A.D. from testifying
2 against him at trial, and that his actions were the cause of her present unavailability. *United States*
3 *v. Johnson*, 767 F.3d 815, 822—23 (9th Cir. 2014). As summarized above, Pruitt repeatedly
4 encouraged A.D. to not cooperate with the authorities, to change her story, to get rid of her cell
5 phone to avoid being tracked by the police, and to provide her new phone number to him
6 surreptitiously. He did all this while knowing he had twice been told by the court to not contact
7 A.D. As a result of his actions, the Government has not been able to locate A.D.

8 “A witness is considered unavailable for purposes of the Confrontation Clause if the
9 prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” *United States*
10 *v. Matus-Zayas*, 655 F.3d 1092, 1101 (9th Cir. 2011) (quotation omitted). In this case, the sealed
11 declarations of the Government’s agents describe their efforts to locate A.D.² Despite those good-
12 faith efforts, the Government has not been able to contact or locate her. At this time, she is
13 apparently unavailable to testify at trial. However, the Government must continue to use good-
14 faith efforts to locate A.D. up until the time of trial. *Id.* at 1102 (“[T]he obligation remains on the
15 government to provide evidence at trial demonstrating the witness’s unavailability as a predicate to
16 the admission of the material witness’s testimony.”). Should the Government not be able to locate
17 and present A.D. at trial, I will allow the Government to introduce her journal and the phone call
18 recordings at trial.

19 IT IS HEREBY ORDERED the Government’s motion (ECF No. 82) is **GRANTED IN**
20 **PART**. The Government’s requests to admit the journal and jail calls are not barred by the
21 Confrontation Clause. Whether specific portions of the journal and calls are barred by other
22 objections will be decided at trial.

23 DATED this 1st day of December, 2017.


24 ANDREW P. GORDON
25 UNITED STATES DISTRICT JUDGE

26 ² I allowed the Government to file under seal declarations and affidavits from detectives detailing
27 their efforts to locate A.D. I have reviewed them *in camera*. The Government has used good-
28 faith efforts to locate A.D. Given Pruitt’s violations of this court’s no-contact orders and his
attempts to dissuade A.D. from testifying, the Government’s efforts to locate A.D. should remain
confidential. See ECF No. 92 at 3, n. 1.